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In The
Supreme Court Of The United States
October Term, 1997

FEDERATION OF CONNECTICUT TAXPAYER ORGANIZATIONS ET AL.,

Petitioners

v.

CHRISTOPHER BURNHAM ET AL.,

Respondents

RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

COUNTERSTATEMENT OF THE CASE 2

REASONS FOR DENYING THE WRIT 5

I. The Connecticut Supreme Court Has Held That Connecticut's Constitutional Spending Cap, Art. III, §18(b), Is Not Presently Effective, And So The Petitioners' Action Fails. 5

CONCLUSION 6

TABLE OF AUTHORITIES

Cases:

In re Joint E. & S. District Asbestos Litigation, 78 F.3d 764, 776 (2d Cir. 1993) 6

Nielsen v. State, 236 Conn. 1 (1996) 4, 5, 6

Constitutional Provisions:

Art. III, § 18(b) 2, 4, 5

Rules and Regulations:

42 U.S.C. § 1983 3

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COUNTERSTATEMENT OF THE CASE

In this action the petitioners, the Federation of Connecticut Taxpayer Organizations (the "Federation"), have for a third time asked the federal courts to issue injunctive relief against Connecticut state officials for the same alleged violations of Connecticut's constitution. Each time the federal district and appellate courts have declined. This Court too should decline.

In 1991, both houses of Connecticut's General Assembly passed House Joint Resolution 205, which, among other things, proposed to amend Article III of Connecticut's constitution to add a new section 18. Subsection (b) of § 18 provided for a constitutional "spending cap":

> (b) The general assembly shall not authorize an increase in ***general budget expenditures*** for any fiscal year above the amount of ***general budget expenditures*** authorized for the previous fiscal year by a percentage which exceeds the greater of the percentage ***increase in personal income*** or the percentage ***increase in inflation***, unless the governor declares an emergency or the existence of extraordinary circumstances and at least three-fifths of the members of each house of the general assembly vote to exceed such limit for the purposes of such emergency or extraordinary circumstances. ***The general assembly shall by law define "increase in personal income", "increase in inflation" and "general budget expenditures" for the purposes of this section*** and may amend such definitions, from time to time, provided general budget expenditures shall not include expenditures for the payment of bonds, notes or other evidences of indebtedness. ***The***

> ***enactment or amendment of such definitions shall require the vote of three-fifths of the members of each house of the general assembly***. (emphasis supplied)

In 1992, the electorate ratified the constitutional amendment, which became Amendment XXVIII of the state constitution.

In 1993, the Federation filed suit in District Court ("*Federation I*") alleging that the General Assembly's passage of the 1992 budget act violated this constitutional cap. The District Court, *Nevas, J.*, denied the Federation's request for injunctive relief and dismissed the action, approving the recommended ruling of Magistrate Judge Joan Glazer Margolis. The District Court held that the Federation could not assert a federal claim under 42 U.S.C. § 1983 premised "solely" upon alleged violations of the Connecticut constitution. The Second Circuit Court of Appeals affirmed on the ground that the Federation had stated no federal cause of action and that *Pullman* abstention was appropriate under the circumstances.

Immediately thereafter, the Federation refiled suit (*"Federation II"*), purporting to amend its complaint, but making identical claims about the defendants' alleged violations of the constitutional cap. The District Court, *Nevas, J.*, dismissed that action too, approving the recommended ruling of Magistrate Judge Holly Fitzsimmons, who had observed:

> In an effort to circumvent the difficulties pointed out by the Court of Appeals [in *Federation I*], plaintiffs have recaptioned each count of the complaint as a 'Violation of the Due Process Clause of the Fifth and Fourteenth Amendment,' and alleged that their retained equity ownership in state tax revenues

> is a property right protected by the United States Constitution.

The Magistrate Judge then declared:

> This is not a federal claim upon which federal relief can or should be granted. These are issues which, under principles of federalism, the state courts should address first. For the reason set out in the November 30, 1993, opinion of Magistrate Judge Margolis, which was ratified by District Judge Nevas, and for the reasons stated in the Second Circuit's panel opinion, this case was dismissed once and should be dismissed again.

The Federation again appealed to the Second Circuit Court of Appeals, which again affirmed, holding that the federal courts should abstain. 60 F.3d 811 (2d Cir. 1995). This Court denied the Federation's petition for a writ of certiorari on November 13, 1995. 133 L.Ed.2d 406 (1995).

Meanwhile, an action styled *Nielsen v. State* had been brought in Connecticut Superior Court challenging the General Assembly's failure to implement the spending cap amendment, Art. III, § 18(b). The Federation appeared as amicus curiae in that case and filed a brief in support of the plaintiffs. On February 6, 1996, the Connecticut Supreme Court affirmed the Superior Court's dismissal of that case, holding that Art. III, § 18(b) was nonself-executing, had not been executed and the question presented was nonjusticiable. *Nielsen v. State*, 236 Conn. 1 (1996).

Undaunted, the Federation began this *third* federal action (*"Federation III"*) shortly after the *Nielsen* decision. The Federation has made the identical claims it has made in its prior suits. In the first count, the Federation claimed that "Art. III § 18(b) of the Connecticut Constitution is self-

executing and became fully effective on November 25, 1993 upon certification by the Secretary of [the] State." (Complaint, JA #2, ¶ 25) It then claims that the spending cap has been violated for the fiscal year 1995-96. (*Id.*, ¶ 26) Finally it alleged that the Federation "retains a legal interest protected by the Due Process Clause" in state tax revenues, and that since the defendants are allegedly spending state money illegally, the Court should enjoin them. (*Id.*, ¶¶ 27-28) The second count makes identical allegations for the fiscal year 1996-97.

Magistrate Judge Margolis once again recommended dismissal of the case on both Eleventh Amendment and abstention grounds. The District Court, *Arterton, J.*, agreed and dismissed the case. For a third time the Federation appealed to the Second Circuit Court of Appeals, which again affirmed. The petitioners again seek a writ of certiorari.

REASONS FOR DENYING THE WRIT

I. The Connecticut Supreme Court Has Held That Connecticut's Constitutional Spending Cap, Art. III, §18(b), Is Not Presently Effective, And So The Petitioners' Action Fails.

The Federation's entire argument proceeds from a faulty premise: that Connecticut's constitutional spending cap, Conn. Const. Art. III, § 18(b), is "self-executing and became fully effective on November 25, 1993 upon certification by the Secretary of [the] State." (JA #2, ¶ 25) Connecticut's highest court has held in *Nielsen* that, contrary to the premise of the Federation's case, the constitutional spending cap is not presently "operative," but establishes only a "future right to a spending cap" that has not yet matured. The three terms contained in the amendment to the State Constitution have "no inherent meanings." Rather, defining them requires the "exercise of political judgment."

Unless and until the legislature exercises this political judgment, the spending cap amendment provides no present right to the citizens of the state. As the final arbiter of interpretations of the state constitution, this decision of the Connecticut Supreme Court is thus binding on the federal courts.[1/]

From the holding of *Nielsen* follow two conclusions that doom the Federation's claim.

First, as the Court of Appeals properly held: "[s]ince the alleged violation of the State's constitution was the source of the plaintiffs' claimed due process deprivation, plaintiffs have not stated a claim upon which relief may be granted." Second, as the Court of Appeals alternatively held, *Nielsen* makes for a compelling argument for *Pullman* abstention. A federal court could not decide the federal constitutional claim unless it decided the purportedly unclear State law issue (the spending cap terms), and the State courts can decide, and in fact have decided, the State law issue in a way that avoids the federal issues.

Thus, notwithstanding the Federation's attempts to inflate the importance of this case, this matter does not in fact implicate intricate or unsettled questions of taxpayer standing or standards for such actions, and fails to implicate any federal interests that should be decided by this Court.

1/ The Federation is somehow of the opinion the Connecticut Supreme Court's statements in *Nielsen* are "dictum." This is clearly not so. Even if it were, however, in deciding questions of state law, federal courts must strive to predict how the highest court in the state forum would resolve the purportedly uncertain state law question. *In re Joint E. & S. District Asbestos Litigation*, 78 F.3d 764, 776 (2d Cir. 1993). *Nielsen* serves as a pretty good indicator.

CONCLUSION

For all of these reasons, this Court should deny the writ.

Respectfully submitted,

RESPONDENTS

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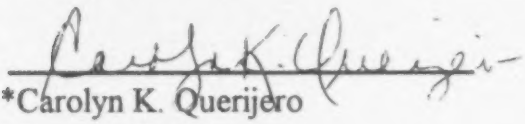

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